GUN KIM LUU v. PUBLIC PROSECUTOR

[A. Cr. J. (Ong J.) September 12, 1960]

[K. L. — Selangor Criminal Appeal No. 55 of 1960]

Road Traffic Ordinance, 1958, ss.22(2), 74(1), 91(1) and 92 — Joinder of charges — When permissible — Police investigation diaries tendered and admitted in evidence — Inadmissibility of.

Criminal Procedure Code (Cap. 6), ss.163, 164, 165, 166 and 170.

The appellant was charged on three counts under sections 91(1), 22(2) and 74(1) of the Road Traffic Ordinance, in each of three summons cases, making a total of nine charges in all. The prosecution applied for them to be heard together at one trial, to which the appellant made no objection. In the result he was convicted on all counts and was sentenced. He was also disqualified from holding or obtaining a driving licence for a period of one year from the date of conviction.

The evidence for the prosecution rested solely on the testimony of two prosecution witnesses who deposed that they carried out observations on motor car BA 8419 over a certain period, and the first witness alleged in general terms that at all material times the appellant was driving the said vehicle. However neither witnesses said even one word on oath as to what he observed on the times and dates set out in the charge. Instead, investigation diaries were tendered by the prosecution and admitted as part of the prosecution evidence.

Held: (1) the exceptions to section 163 of the Criminal Procedure Code, which are set out in sections 164, 165, 166 and 170, are cumulative and not mutually exclusive. Whether a joinder of several charges is permissible or not must, in the ultimate analysis, depend upon the circumstances of each individual case;

(2) investigation diaries can be used only for the purpose of refreshing memory, and no justification exists for use of an investigation diary as primary evidence. The diaries should never have been admitted as evidence, and as no case had been made out against the appellant without such inadmissible evidence, the appeal must be allowed.

Per curiam: A conviction under section 92(1) of the Road Traffic Ordinance, 1958, leaves no option for the Magistrate but to confiscate the vehicle.

Cases referred to:—

(1) *Cheong Sik Kwan* v. *Public Prosecutor* [1959] M.L.J. 189.

(2) *Lim Yean Leong* v. *Public Prosecutor* [1940] M.L.J. 272.

CRIMINAL APPEAL.

B. Kaher Singh for the appellant.

Tengku Ahmad Rithauddeen bin Tengku Ismail (Deputy Public Prosecutor) for the respondent.

Ong J.: The appellant was charged before the Magistrate at Kuala Selangor on three counts, under sections 91(1), 22(2) and 74(1) of the Road Traffic Ordinance, in each of three Summons Cases Nos. 234, 239 and 240 of 1960, making a total of nine charges in all. The prosecution applied for them to be heard together at one trial, to which the appellant made no objection. In the result he was convicted on all counts, and the following sentences passed, namely: on the 1st charge, $250 fine or 2 months imprisonment; on the 2nd charge, $100 fine or 1 month imprisonment; and, on the 3rd charge, $100 fine or 1 month imprisonment. The appellant was also disqualified from holding or obtaining a driving licence for a period of one year from the date of conviction. He now appeals against his convictions and sentences.

I do not propose to deal at length with the question of the propriety of hearing the nine charges in one trial. The principles to be applied have been enunciated clearly enough in *Cheong Sik Kwan* v. *Public Prosecutor*[1], and in the earlier decisions of another Court of Appeal in *Lim Yean Leong* v. *Public Prosecutor*[2], that the exceptions to section 163 of the Criminal Procedure Code, which are set out in sections 164, 165, 166 and 170, are cumulative and not mutually exclusive. Whether a joinder of several charges is permissible or not must, in the ultimate analysis, depend upon the circumstances of each individual case. In my view the appellants' technical objection on this point fails because all three charges in each case arose over one transaction and come within section 165(ii) which provides:

> "If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with and tried at one trial for each of such offences."

Now, there can clearly be no objection to the first charge in the three separate cases being heard together under section 164(i). As the acts on which the first charge are founded constitute the basis of the other two charges, the provisions of section 165(ii) justify the learned Magistrate in trying the second and third charges with the first, so that, if he could with propriety try the three first charges together, there can be no possible objection to his trying all nine. No suggestion is made that the appellant had in any way been prejudiced in his defence, because proof of guilt on the first charge suffices to prove the other two charges, which are subsidiary thereto.

On other grounds, however, the appeal must succeed. The evidence for the prosecution rests solely on the testimony of P.W. 1 and P.W. 2 who deposed that they carried out observations on motor-car BA. 8419 over a certain period, and P.W. 1 alleged in general terms that at all relevant times the appellant was driving the said vehicle. The material times and dates in the three cases were: 11.10 a.m. on 27.4.60; 12.25 p.m. on 5.5.60 and 11 a.m. on 4.5.60. However, neither witness said even one word on oath as to what he observed on the times and dates set out in the charges. Instead, investigation diaries were tendered by the prosecution and admitted as part of the prosecution evidence. Apart from being unsworn statements, what these diaries contain are undoubtedly statements made in the course of police investigations, to which section 113 of the Criminal Procedure Code applies. Moreover, the law is clear, in section 119 of the Code, that such investigation diaries can be used only for the purpose of refreshing memory, and no justification exists for use of an investigation diary as primary evidence. These diaries should never have been admitted. Without such inadmissible evidence, no case has been made out against the appellant in respect of any of the nine charges. I therefore allow the appeal, and set aside the convictions and sentences on all charges, and

order that any fines, if paid, be refunded. The order of disqualification is also set aside.

I would add a few remarks in connection with this case. The learned Magistrate appears to have overlooked the provisions of section 92(4) of the Road Traffic Ordinance. In my view, a conviction under section 92(1) leaves no option for him but to confiscate the vehicle, and I would draw the attention of all Magistrates to this point. Another observation I would make is that it is time members of the public realise that it is in their own interest to use regular public service vehicles instead of unlicensed hire cars or taxis, because in the event of death or injury suffered by them while such vehicles are used in breach of the conditions of their insurance policy they can have no hope of recovering compensation from the driver or owner who, in practically all cases, are men of straw.

Appeal allowed

Solicitors: *Kaher Singh & Karam.*

ONG KENG HUAT v. HONGKONG UNITED CO. LTD. & ANOR.

[C. A. (Thomson C.J., Rigby and Neal JJ.) September 13, 1960]

[Ipoh — F.M. Civil Appeal No. 29 of 1960]

Partnership — Breach of duty — Whether partner individually liable for loss arising out of partnership — Whether culpable negligence — Evidence of business practice.

The parties were partners for the purpose of operating a cinema. The appellant was the General Manager with executive powers and control, the second respondent was Treasurer and the first respondent was in charge of arranging shows at the cinema. In 1957 the cinema was badly damaged as a result of fire. Disputes arose between the partners resulting in a dissolution of partnership. The respondents alleged that the appellant, as a partner entrusted by the terms of the partnership agreement with the management of the cinema was at all times liable for such matters as the insurance of equipment installed in the cinema and also insurance against workmen's compensation payable to employees of the partnership. It was alleged that he failed to insure the fans installed in the cinema and to effect sufficient insurance against workmen's compensation in consequence whereof the partnership had suffered loss. In his defence the appellant denied that he acted in breach of his duty to his partners as alleged. He alleged that the matter of insurance was fully discussed at a meeting of the partners, and the details were left to a Mr. Tan Chong.

Held: (1) it could not be disputed that there was a breach of duty on the part of the appellant to effect the necessary insurance;

(2) in order to make one partner liable for any loss arising out of the partnership it is necessary to establish either that he was guilty of fraud or culpable negligence or wilful default: whether a mere breach of the duty of the appellant in this case to effect the necessary insurance amounted to culpable negligence was a question of fact depending upon the degree of negligence involved;

(3) in the absence of some evidence as to what is the practice in regard to effecting insurance in this type of business it is impossible to say that the mere breach of duty on the part of the appellant amounted to culpable negligence, and hence the appellant is not personally liable.

Case referred to:—

(1) *In re National Bank of Wales, Ltd.* [1899] 2 Ch. 629 at 672.

CIVIL APPEAL.

R. Talalla for the appellant.

B. K. Das and *N. Thurairajah* for the respondents.

Rigby J. (delivering oral Judgment): This is an appeal from a decision of Mr. Justice Azmi. The appeal is restricted to part of an order made by him arising out of a partnership action.

The brief facts of the case were that in August, 1956, the appellant and the two respondents entered into a partnership agreement for the purpose of taking over and running the Star Cinema, Ipoh, for a period of five years.

In pursuance of that agreement the lease of the cinema was obtained from the owners for a period of five years as from 1st September, 1956. Under the terms of the partnership the partners' shares were in equal shares and under the partnership agreement itself the First Party, that is to say the appellant, was to be the General Manager of the Cinema with executive powers and control. The second respondent was to be the Treasurer and the first respondent was to be in charge of arranging for the showing of the particular films to be exhibited at the Cinema.

In January, 1957, the Cinema was badly damaged as a result of fire and was not in fact repaired until 6th February, 1958. In the meantime it would appear that the partnership, both before and, indeed, after the fire, got into financial difficulties, and disputes arose between the partners resulting in a dissolution of partnership in November, 1957, and an application to the Court for a declaration as to the date of dissolution and for the usual order for accounts to be taken.

By paragraph 26 of the plaintiffs' (that is to say the present respondents) statement of claim it was alleged that the defendant (that is to say the present appellant). as the partner entrusted by the terms of the partnership agreement with the management of the said Star Cinema, was at all times liable for such matters as the insurance of equipment installed in the said Star Cinema and also insurance against workmen's compensation payable to employees of the partnership. It was alleged that in breach of his duty in this behalf which, under the terms of the partnership agreement, he owed to the plaintiffs as his partners, the defendant failed to insure the fans installed on the said theatre premises and hired from the Central Electricity Board, and also to effect sufficient insurance against workmen's compensation in consequence whereof the partnership has suffered loss as a result of the said fire. Particulars of the loss were the cost of fans hired from the Central Electricity Board and destroyed, and compensation payable to an employee who suffered fatal injuries as a result of the fire.

By paragraph 12 of his defence the defendant denied that he acted in breach of his duty to his partners, the first and second plaintiffs, as alleged. The paragraph continues that the matter of insurance was fully discussed at a meeting of the